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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 20th April 2005

No. 3853-li/1(S)-6/2005-L. E.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 25th February 2005 in Industrial Dispute Case No. 57 of 2003 of the Presiding Officer, Labour Court, Sambalpur to whom the industrial disputes between the Management of Orissa State Co-operative Marketing Federation Limited, MARKFED, Orissa, Bhubaneswar and its Workman Shri Binod Bihari Nial was referred for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE COURT OF THE PRESIDING OFFICER
LABOUR COURT, SAMBALPUR
INDUSTRIAL DISPUTE CASE No. 57 OF 2003
Dated the 25th February 2005

Present :

Shri G. N. Patra, LL. B.
Presiding Officer, Labour Court,
Sambalpur.

Between :

The Management of First Party—Management
Orissa State Co-operative Marketing
Federation Limited, MARKFED, Orissa,
Bhubaneswar.

And Second Party—Workman
Its Workman
Shri Binod Bihari Nial
At Barpalipada
P. O./Dist. Balangir

Appearances :

For the First Party—Management	..	Shri Sibarama Bisoi Area Manager, O.S.C.M.F. Limited, Balangir.
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For the Second Party—Workman	..	Self
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AWARD

This case arises out of the reference made by the Government of Orissa, Labour & Employment Department under Sections 10 and 12 of the Industrial Disputes Act, 1947 vide Memo No. 10378(5), dated the 30th October 2003 for adjudication of the case Scheduled below :

“Whether the termination of services of Shri Binod Bihari Nial, NMR, Peon with effect from the 1st May 2001 by the Management of M/s Orissa State Co-operative Marketing Federation Limited, MARKFED, Orissa, Bhubaneswar is legal and/ or justified ? If not, what relief he is entitled to ?”

2. The case of the second party workman in brief is as follows—

The second party workman was continuously working as N. M. R. under the Managing Director, Orissa State Co-operative Marketing Federation Limited (MARKFED), Orissa, Bhubaneswar (hereinafter called first party management) from the 17th June 1985 to the 30th February 2001 in different capacity such as Peon, Sales Assistant and Watchman. All of a sudden he was retrenched from service with effect from the 30th April 2001 vide Order No. 818, dated the 28th April 2001 on payment of compensation and one month's pay in lieu of notice as per provision under Section 25-F(a) (b), but in violation of Section 25-G of the Industrial Disputes Act, 1947. Though he was retrenched from service with effect from the 30th April 2001, his Junior N. M. R. Peons namely Shri Sanatan Swain, Shri Ganeswar Mohapatra, Shri Purna Chandra Sahu, Shri Chittaranjan Mohanty, Shri Chandramani Khandei, Shri Rajani Kanta Sahu and Shri Kamala Kanta Sethi who were appointed after his appointment on the 17th June 1985 are retained in service in violation of the provisions of Section 25-G of the Industrial Disputes Act, 1947. That apart one Shri Hrushikesh Mohapatra and Shri Pitabas Rout, who were appointed as a N. M. R. Peon after the appointment of second party workman were also adjusted in the Head Office in the regular vacancy of Peon in violation of Section 25-G of Industrial Disputes Act, 1947. The further case of the second party workman is that all the N. M. R. Workmen are made to work in different categories like Peon, Watchman and Sales Assistant. All of them comes under the category of unskilled N. M. R. and as such there cannot be separate categories for Peon, Watchman and Sales Assistant etc. It is being intertransferable as had already been done for years including the second party workman as being the branches of some unskilled N. M. Rs., it is practically and legally inseparable. Therefore their seniority on the basis of their date of joining should have been determined and there cannot be separate category for Peons, Watchman or Sales

Assistant etc. The establishment of first party management is an industrial establishment and more than 500 workmen have been appointed in its different units and as such at the time of retrenchment of second party workman from service, provision of Section 25-N should have been complied instead of Section 25-F of the Industrial Disputes Act. The second party workman has made several representations to the first party management but of no avail. His retrenchment being illegal, invalid and arbitrary, the second party workman raised an Industrial Dispute which later on culminated into the present reference. The second party workman having remained unemployed after termination of service he prays for his reinstatement in service with full back wages and cost.

The first party management contested the case and filed written statement *inter alia* denying the allegations made by the second party workman in his statement of claim except admitting the fact of continuous appointment of second party workman and his retrenchment from service. According to the first party management, the second party workman was appointed to work as Peon on work charged daily wage basis with effect from the 17th June 1985. That the business of the first party management was reduced to a great extent and due to mounted accumulated losses it was decided in a high level meeting on the 5th June 2000 to reduce man power as a measure of reorganisation and to retrench at least 100 numbers of NMR employees. As per the said decision, a special committee was constituted who prepared a list of surplus staff after obtaining bio-data from each area office and accordingly seniority lists of each category of NMR employees were prepared and as per recommendation of the Special Committee, 99 numbers of NMR/DLR employees were selected for retrenchment. Ultimately, the Managing Director approval list of 96 persons including 37 Peons out of the gradation list of NMR Peons for retrenchment and they were accordingly retrenched on the 28th April 2001 on payment of one month's notice pay in lieu of notice and retrenchment compensation in accordance with the provisions under Section 25-F and G of the Industrial Disputes Act. The list of all nine persons stated to be juniors to the second party workman are actually not Peons. Out of the nine persons, six persons Shri Sanatan Swain, Shri Ganeswar Mohapatra, Shri Purna Chandra Sahoo, Shri Rajani Kanta Sahu, Shri Chittaranjan Mohanty and Shri Chandramani Khandei were Watchman and Shri Kamala Kanta Sethi was Sales Assistant. The rest persons, namely, Shri Hrushikesh Mohapatra and Shri Pitabas Rout were appointed as regular Peons on the 1st September 1997 as per the decision of P.M.C. and the second party workman has never challenged their regular appointment and therefore it cannot be said that their appointment is in violation of Section 25-G of the Industrial Disputes Act and also it is beyond the scope of reference. The second party workman was appointed as a Peon, except for a short period when he was engaged as Sales Assistant and Watchman as stop-gap arrangements. At the relevant point of time when gradation lists of different categories of N. M. R. were prepared, the second party workman was working as Peon and as such he was considered as an N. M. R. Peon for the purpose of preparation of gradation lists of different categories of workman. The seniority list of different categories of workman is to be prepared as per the nature of appointment/work discharged and not according to the unskilled/semi-skilled/skilled category for the purpose of retrenchment. All categories of N. M. R. workman cannot be grouped together for the purpose of retrenchment.

3. Further it is the case of the first party management that the first party management as a whole is not a Factory nor it is declared or registered as a Factory. Although the first party management owns the Granular Fertiliser Plant at Bargarh which is a factory and registered under Factories Act, 1948, it has never employed more than 100 or more workmen in average on any day during past 12 months from the relevant day. The “workman” not engaged in the factory cannot be counted for calculating the number of workman engaged in the factory. Therefore the first party management or any other unit of it cannot be called an Industrial Establishment within the meaning of Section 25-L of the Industrial Disputes Act and therefore consequential provisions of Section 25-N should not have been followed for retrenching the second party workman from service. The second party workman has accepted the retrenchment compensation under Section 25-F of the Industrial Disputes Act and now he is estopped from challenging the retrenchment. The plea of the second party workman that he is unemployed from the 1st May 2001 is quite unbelievable. He was a daily wage earner under the Federation and as such he has every scope to earn his livelihood by any daily wage engagement. Therefore, according to the first party management the order of retrenchment of the second party workman from service is legal and valid and as such the management prays to answer the reference in its favour.

4. On the above pleadings of the parties the following issues have been framed for adjudication :—

ISSUES

- (i) “Whether the unskilled N.M.R. workmen like N.M.R. Peon, N.M.R. Watchman, N.M.R. Sales Assistant etc. from one category ?
- (ii) Whether the termination of services of second party workman by the first party management with effect from the 30th April 2001 is legal and justified ?
- (iii) Whether the Orissa State Co-operative Marketing Federation Limited, MARKFED, Orissa (First party) is an “Industrial Establishment” as defined under Section 25-L of the Industrial Disputes Act, 1947 read with clause(m) of the Section-2 of the Factories Act, 1948, so as to attract the provisions of Section 25-N of the Industrial Disputes Act, 1947 in the matter of retrenchment of the second party workman ?
- (iv) To what relief the second party workman Shri Nial is entitled ?”

During hearing both parties adduced oral and documentary evidence in support of their respective cases. The second party workman has examined himself as W. W. 1 and proved the documents which are marked as Exts. A to M. On the otherhand, the first party management has examined one Shri Sibram Bisoi, Area Manager, MARKFED (Management), Balangir as M. W. 1 and proved the documents which are as marked as Exts. 1 to 21.

FINDINGS

5. *Issue Nos. (i) and (ii)*—Both these issues being interlinked are taken up together for the sake of convenience. The second party workman, both in his pleadings and evidence is

continuously harping upon the fact that although he was initially engaged as a N.M.R. Peon with effect from the 17th June 1985, he was put to do the work of N.M.R. Watchman and N.M.R. Sales Assistant as per the order of management till the date of his termination on the 30th April 2001 and that all the above work involves unskilled work. The above fact is not disputed at all by the first party management and the same is also evident from the Exts. H and J, the different engagement orders given to second party workman to work as Watchman etc. From the above fact it is clear that unskilled N. M. Rs. are *inter se* changeable and transferable and the same is also evident from the cross-examination of the M. W. 1 at Para. 5. Further it appears from Schedule B of Ext. 9, the xerox copy of the Staff Service Rule filed by the first party management that different posts under the establishment of the first party management has been categorised which is marked as Ext. 9/a. Under Ext. 9/a the post of Peon, Sweeper, Watchman, Guest Room Attendant, Helper, Attendant, Gardner and Salesman are categorised as one category i.e. "unskilled". So the pleadings of the management that the Peon, Sweeper, Watchman etc. each form separate category is against its own service rules and hence cannot be accepted. There is no controversy that seven persons, namely Shri Sanatan Swain, Shri Ganeswar Mohapatra, Shri Purna Chandra Sahu, Shri Chittaranjan Mohanty, Shri Chandramani Khandei, Shri Kamala Kanta Sethy and Shri Rajani Kanta Sahu are engaged to perform unskilled work such as Watchman or Sales Assistant long after the engagement of the second party workman and as such held to be junior to the second party workman. In view of my above discussion these seven persons and the second party workman come under the category of unskilled worker which is interchangeable. Preparation of separate seniority list for Peons, Watchman and Sales Assistants etc. for the first time only at the time of retrenchment vide Exts. 17, 19 and 20 and retrenchment of the second party workman on the basis of that seniority list is not only irrational, unreasonable and improper, but also against the own service Rule of the first party management and in violation of Section 25-G of the Industrial Disputes Act, 1947.

6. Moreover according to second party workman, two other persons, namely Shri Hrushikesh Mohapatra and Shri Pitabas Rout who were engaged as N.M.R. Peon much after his engagement are still working under the first party management whereas he being a senior employee in the same unskilled category was retrenched from service. The first party management in his written statement at Para. 12 has stated that these two persons, namely Shri Hrushikesh Mohapatra and Shri Pitabas Rout were appointed as regular Peons on the 1st September 1987 as per the decision of the P. M. C. and that the second party workman has never challenged their such appointment and as such there is no violation of Section 25-G of the Industrial Disputes Act. Their such appointment therefore, cannot be challenged now as it is beyond the scope of this reference. At the instance of the second party workman, the first party management produced the appointment and regularisation orders of the above named seven persons and the P. M. C. meeting files. The xerox copy of the proceeding of P. M. C. meeting, dated the 28th August 1987, the xerox copy of engagement and regularisation orders of Shri H. K. Mohapatra, dated the 27th December 1990 and the 16th September 1997, and the xerox copy of engagement order, dated the 27th December 1990 and the 6th March 1992 and regularisation order, dated the 16th September 1997 of Shri pitabas Rout have been marked as Exts. 10, 11, 11/(a), 12, 12/(a) and 12/(b) respectively from the side of

the management. It appears from Exts. 10, 11 and 12 series that Shri H. K. Mohapatra and Shri Pitabas Rout were appointed as Sales Assistant-cum-Peon on consolidated wages for a period of 89 days purely on temporary and seasonal basis with effect from the 27th December 1990 and their services were regularised with effect from the 1st September 1997 as per the decision of the P. M. C. vide Ext. 10. In the said P. M. C. meeting, it has been held as follows :—

(c) Consideration of representation of Shri Hrushikesh Mohapatra, Shri Pitabas Rout, Shri Braja Kishore Sethi and Shri Keshab Guru N. M. R. employees.

Considering the gravity of cases, it is decided that the services of following N. M. R. employees be regularised with effect from the 1st September 1997 as Peon and Sales Assistant :—

1. Shri Hrushikesh Mohapatra, Peon
2. Shri Pitabas Rout, Peon
3. Shri Braja Kishore Sethi, Peon
4. Shri Keshab Guru, Sales Assistant.

It is crystal clear from the above documentary evidence that while regularising the services of Shri H. K. Mohapatra and Shri Pitabas Rout, P. M. C. has totally bye-passed the case of second party workman without considering his long pending case inspite of the fact that he was appointed in same category with effect from the 17th June 1985, that on earlier occasion he was regularised in the post of Peon after due selection vide Exts. B to E, that after working for more than $1\frac{1}{2}$ years in the regular post, his regular appointment was cancelled abruptly vide Ext. F without any rhyme or reason and that he has made a number of representations vide Ext. G series. The above facts clearly shows that the first party management has not only suppressed the above material facts but also has not come with a clean hand. It is not disputed and also evident from the Ext. 17, the seniority list prepared by management at the time of impugned retrenchment that the said Shri H. K. Mohapatra and Shri pitabas Rout are still working as Peon under the first party management. Thus, the termination of service of the second party workman Shri Binod Bihari Nial, N. M. R. Peon with effect from the 30th April 2001 by retaining the service of his other two juniors, namely Shri H. K. Mohapatra and Shri Pitabas Rout is not only illegal, unjust and improper but also in violation of provisions of Section 25-G of the Industrial Disputes Act, 1947 and also it amounts to colourable exercise of power and unfair labour practice followed by the first party management. Accordingly issue No. (i) and (ii) are answered in favour of the second party workman.

7. *Issue No. (iii)*—One of the core point on which the second party workman, amongst other things, challenged his retrenchment from service, is that the establishment of the first party management, namely M/s Orissa State Co-operative Marketing Federation limited, Orissa, is an “Industrial Establishment” as defined under Section 25-(L) of the Industrial Disputes Act, 1947, read with clause-m of Section 2 of the Factories Act, 1948 as it has always employed more than 500 workmen at its different branches/offices and factories through the State of Orissa. Apart from producing and selling fertiliser named “Shymla” at its Bargarh

Granular Fertiliser Factory, the first party management is also procuring and selling other branded Fertilisers. As such second party workman is entitled to retrenchment benefits as per Section 25-N of the Industrial Disputes Act, instead of Section 25-F of the Industrial Disputes Act as has been done in this case. The first party management on the otherhand, strongly refuted the above assertion of the second party workman on the ground that the first party management, as a whole, is not a factory nor it is declared or registered as Factory. Although, the first party management has admitted that it owns the Granular Fertiliser Plant situated at Bargarh which has been registered under the Factories Act, 1948, it does not employ more than 100 workmen,in average, on any day during past 12 months from the relevant day. In support of it, the first party management filed xerox copy of the licence granted by the Chief Inspector of Factories, Orissa on the 23rd March 2001 and took the plea that the "workman" not engaged in the said factory cannot be counted for calculating the number of workman engaged in the factory. it is therefore, argued on behalf of the first party management that neither its establishments as a whole nor its Granular Factory at Bargarh as an unit can be called an "Industrial Establishment" within the meaning of Section 25-L of the Industrial Disputes Act and consequently the provisions of Section 25-N of the Industrial Disputes Act, is not applicable in this case for retrenching the second party workman from service.

During hearing, the workman filed affidavit in shape of examination-in-chief in support of his case categorically asserting his stand. In his cross-examination, the second party workman has stated that about more than 500 workmen had been working under the first party management. M. W. 1 in his cross-examination has also deposed that the Granular Fertilizer Plant at Bargarh and Solvent Extraction Plant (Oil Complex, Bargarh), Jagatpur Cold Storage and Bhubaneswar Cold Storage are different units of the first party management and the Managing Director of the first party management is the appointing and controlling authority of all the above units and that at present the number of employees under the first party management is more than 400 but less than 500. Now the question is whether the different units of the management including Granular Fertilisers Plant, Bargarh situated at different parts constituted one "Industrial Establishment" as has been defined under Section 25-L of the Industrial Disputes Act and Section 25-L (Chapter V-B) of the Industrial Disputes Act, 1947 defines "Industrial Establishment" as follows :—

"25-L. Definitions :—for the purpose of this chapter—

- (a) "Industrial establishment" means—
 - (i) a factory as defined in clause (m) of Section 2 of the Factories Act, 1948;
 - (ii) a mine as defined in clause (j) of sub-section (1) of Section 2 of the Mines Act, 1952 ; or
 - (iii) a plantation as defined in clause (1) of Section 2 of the Plantations Labour Act, 1951 ;
- (b) notwithstanding anything contained in sub-clause (ii) of clause (a) of Section 2.
 - (i) in relation to any company in which not less than 51 per cent of the paid up share capital is held by the Central Government ; or

- (ii) in relation to any corporation not being a corporation referred to in sub-clause (i) of clause (a) of Section 2 established by or under any law made by Parliament".

Clause (m) of Section 2 of Factories Act, 1948 defines the term "Factory" as follows :—

"(m) 'factory' means any premises including the precincts thereof :—

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on ; or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the union, a railway running shed or a hotel, restaurant or eating place.

Thus, from the above definition, it is crystal clear that the different branches of establishments of a Company or owner, situated at different parts of a State or Country need not necessarily be located in one and same premises so as to make an "Industrial Establishment" as defined under Section 25-L of the Industrial Disputes Act read with Clause (m) of Section 2 of Factories Act. The Granular Fertiliser Plant at Bargarh has been producing fertiliser and different area offices and other units of the first party management situated at different parts of the State have been selling the fertiliser, cannot exist independently in view of the fact that there exist functional integrality and interdependance community of financial/managerial control and management in between all the units and they remain inseparable. Hence all these units should be held to have constituted one "Industrial Establishment". In view of the above, it is not possible to accept the stand of the first party management that the establishment of first party management as a whole or its Granular Fertiliser Plant at Bargarh employing less than 100 workmen is not an "Industrial Establishment" as defined under Section 25-L of the Industrial Disputes Act to which clause V-B of Industrial Disputes Act applies. In this connection, the principles laid down by the Hon'ble Supreme Court in the case of S. G. Chemicals and Dyes Trading Employees Union *Vrs.* S. G. Chemicals and Dyes Trading Limited and another, reported in 1986 ILLN has been followed. Consequently since the services of the second party workman in the present case has been terminated in violation of Section 25-N of the Industrial Disputes Act, 1947, such termination is held to be unlawful and ineffective. Thus issue No. (iii) is answered in favour of the workman.

8. *Issue No. (iv)*—The second party workman both in his pleading and evidence has categorically stated that he remained unemployed after termination of service till date in spite of his best efforts for alternative engagement. The first party management has failed to bring any evidence on record to prove that the second party workman has been otherwise gainfully employed after termination of his service. Taking into account the grave illegality committed by the first party management in retrenching the second party workman from service, I am of

the opinion that it would meet the ends of justice if the second party workman is reinstated in his service with full back wages and all other service benefits with costs. Hence the following award :

AWARD

The reference is answered on contest against the first party management with costs. The termination of services of Shri B. B. Nial, N. M. R. Peon with effect from the 1st May 2001 by the first party management M/s Orissa State Co-operative Marketing Federation Limited, MARKFED, Orissa, Bhubaneswar is held to be illegal and unjustified. The first party management is directed to reinstate the workman Shri Nial in service with full back wages and all other service benefits and also to pay him a sum of Rs. 1,000 (Rupees one thousand only) towards the costs of the present proceeding and mental agony suffered by him.

Dictated and corrected by me.

G. N. PATRA
25-2-2005
Presiding Officer
Labour Court, Sambalpur

G. N. PATRA
25-2-2005
Presiding Officer
Labour Court, Sambalpur

By order of the Governor
D. MISHRA
Under-Secretary to Government